U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 March 2006

BALCA Case No.: 2005-INA-00024
ETA Case No.: P2002-CA-09535334/JS

In the Matter of:

MIND BODY SOLUTIONS,
Employer,

on behalf of

OSCAR RAMIREZ OLMOS,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Eliezer Kapuya
Los Angeles, California
For the Employer and the Alien

Before: **Burke, Chapman, and Vittone**[1]
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Mind Body Solutions ("the Employer") filed an application for labor certification[2] on behalf of Oscar Ramirez Olmos (the "Alien") on April 9, 2001. (AF 63). The

[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

employer seeks to employ the Alien as marketing manager (health products distribution). This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as managing and supervising all the marketing transactions for the health products company. The Employer required no education, but required two years of experience in the job offered. (AF 63).

In the Notice of Findings ("NOF"), issued March 22, 2004, the CO found that the Employer failed to document a good faith attempt to recruit a qualified U.S. applicant, and found that the Employer did not provide lawful, job-related reasons for rejecting the U.S. applicant.[3] (AF 59-60). The Employer was forwarded the U.S. worker's resume on September 19, 2002. Although the Employer stated that telephone calls were attempted, the CO found that the telephonic contacts were inadequately documented because the Employer did not provide specific information concerning the attempted telephone calls (e.g., who was contacted, when the calls were made, or the content of any messages). The Employer further sent a certified letter to the U.S. applicant on October 4, 2002, which the CO found to be untimely. The CO found that the Employer did not sufficiently document job related reasons for the rejection of the U.S. worker and suggested that the Employer submit a rebuttal that documented how the U.S. worker was recruited in good faith during the recruitment period and was rejected for lawful, job-related reasons. (AF 60).

In rebuttal dated April 23, 2004, the Employer stated that the U.S. worker was disqualified because he was unavailable based on the Employer's unsuccessful attempts to contact him by telephone and certified mail. (AF 17). The Employer stated that it left a voice message for the U.S. applicant to contact the Employer and submitted a telephone bill that identified a two-minute phone call to the U.S. applicant's phone number on October 2, 2002.

[3] The CO cited the regulations at 20 C.F.R. 656.21(b)(6) and 20 C.F.R. 656.24(b)(2)(ii). (AF 60).

(AF 17, 32). Additionally, the Employer submitted a copy of a certified letter sent to the U.S. applicant that was returned to the Employer as "unclaimed." (AF 17, 21).

The CO issued a Final Determination ("FD") denying labor certification on April 27, 2004. (AF 12-13). The CO explained that the rebuttal did not show that the Employer's attempted contact with the U.S. applicant was timely or sufficiently documented. (AF 13).

On May 10, 2004, the Employer filed a "Motion for Reconsideration, in the Alternative Appeal to BALCA." On June 8, 2004, the CO denied the motion for reconsideration and forwarded the case to the Board of Alien Labor Certification Appeals ("Board"). (AF 1-4, 11). The Board docketed this matter on November 10, 2004.

DISCUSSION

According to 20 C.F.R § 656.21(b)(6), an employer must document that U.S. workers who have applied for the job opportunity were rejected solely for lawful, job-related reasons. This applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. According to 20 C.F.R. § 656.20(c)(8), the job opportunity must be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In the instant case, the CO challenged the Employer's good faith recruitment of a U.S. worker. The burden of proof is on the employer in all alien labor certification applications. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996). Thus it is the Employer's burden to demonstrate good

faith in recruitment and to show that U.S. workers are not able, willing, qualified, or available for this job opportunity.

The one applicant in this case was rejected by the Employer on the basis that he was unavailable or uninterested in the job. The Employer was instructed in the NOF to document its good faith recruitment efforts and the lawful job-related reasons for rejection of the applicant. The NOF noted that the Employer specifically failed to provided information concerning who was called, on what date(s), at what time, how a message was left, or with whom, and the content of any messages. In rebuttal, the Employer presented a telephone bill identifying a two-minute telephone call to the U.S. applicant on October 2, 2002.

The Board in *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*), *citing Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), noted that, although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric*, *supra*, instructed

> an employer must, at minimum, keep reasonably detailed notes on the conversation (e.g., when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation. Prepared checklists may be helpful in documenting what was discussed with the applicants). Where available, phone records showing the time and duration of the phone contacts should be admitted by Employer.

Additionally, the need to do more than make a single telephone call has been established by the Board. *Fort Meyer Construction Corp.*, 2003-INA-117 (June 22, 2004); *citing Bruce A. Fjeld*, 1988-INA-333 (May 26, 1989) (*en banc*).

In the instant case, the Employer reported that the U.S. applicant was not interested in the job and the CO requested that the Employer provide documentation of contact. The Employer submitted documentation, in the form of a telephone bill, which confirmed that an attempted contact was made on October 2, 2002. The Employer asserted that a voice message was left

instructing the applicant to contact the Employer if he was interested in the available position. However, as noted in the FD, the Employer made no effort to more fully explain the content of the two-minute message and failed to specify whether the voice message was left with a person or on a machine. The Employer has not provided documentation of any additional attempts at telephonic contact with the U.S. applicant.

Although the Employer followed up on the single telephone call with a letter to the U.S. applicant by certified mail on October 4, 2002, the CO in the NOF and FD determined that the letter was untimely. We agree. An employer remains under an affirmative duty to commence review and make all reasonable attempts to contact applicants as soon as possible. *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*). The standard for whether recruitment is timely was set forth in *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991 (*en banc*). In that case, the Board determined that the "as soon as possible" standard does not embody a specific time limit. It turns on how long an employer requires for a reasonable examination of the applicant's credentials, including but not limited to the following factors: (a) whether the position requires extensive or minimal credential; (b) whether the recruitment is local; and (c) whether many or only a few persons applied for the position. The Board further indicated that certification should be granted if an employer demonstrates the reasonableness of the time it spent reviewing resumes or applications prior to contact. For the contact to be timely, the interval between resume referral and contact must be spent evaluating resumes in the context of a reasonable and diligent pre-contact recruitment procedure. *Loma Linda Foods, Inc., supra*.

In the present case, regardless of the required credentials or location of the job opening, the Employer received the names of only four U.S. workers on September 19, 2002. The Employer has not demonstrated that thirteen days is a reasonable amount of time to spend reviewing the four resumes or applications before making contact with the particular U.S. applicant discussed herein, nor has the Employer demonstrated that fifteen days is a reasonable delay before attempting written contact.

Based on the foregoing, we conclude the Employer has not met its burden to show that it made a good faith effort to recruit the qualified U.S. worker, and accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.